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No. 00-1407

In The

Supreme Court of the United States

CITY OF ELKHART,

Petitioner,

v.

WILLIAM A. BOOKS and MICHAEL SUETKAMP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding, after engaging in the context based inquiry required by this Court's precedents, that the six foot high Ten Commandments monument located outside the main entrance to the Elkhart Municipal Building violates the Establishment Clause of the First Amendment to the United States Constitution since the monument creates an endorsement of religion and demonstrates no valid secular purpose?

2. Do the two citizens of Elkhart who brought this action have legal standing to mount this challenge where they are forced to come into direct and unwelcome contact with the religious monument on a daily basis as they go about their normal activities and as they participate as citizens of Elkhart, and where they would have to assume special burdens to avoid coming into contact with the monument?

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STATEMENT OF THE CASE

The Municipal Building for the City of Elkhart is located at the corner of Second and High Streets in the downtown area. (Petitioner's Appendix [hereinafter "Pet.App."] 4a). Its main entrance faces onto Second Street. (Deposition of Gary Gilot [hereinafter "Gilōt"]). The Municipal Building contains various governmental offices, including those of the: mayor, legal department, human relations department, city court, prosecutor's office, court clerk, city clerk, planning and development office, and common council, among others. (Pet.App. 64a).

The Ten Commandments monument stands on the northeast corner of the front of the Municipal Building, approximately 46 feet from its main entrance. (Pet.App. 4a-5a). It is less than 11 feet from the sidewalk that runs along Second Street, in front of the Municipal Building. (Pet.App. 5a). It is close to the parking lot for the building. (Gilot).

The monument is granite and is approximately 6 feet high and 3½ feet in width. (*Id.*). It is in the shape of two tablets. (Pet.App. 63a). This is the popular depiction of the Ten Commandments. (Gilot). On the monument is the following text:

> the Ten Commandments
> I AM the LORD thy God.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.

> Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

(Pet.App. 5a). The lettering on the top line of the text, stating "the Ten Commandments" is 2½ to 3 inches in height. (Gilot). The second line, stating "I AM the LORD thy GOD," is 1¾ ~~Inches~~ in height. (*Id.*). The rest of the monument's text is 1¼ inches in height. (*Id.*). The lettering is large enough that even from across Second Street, approximately 65 feet away from the monument, at least the first two lines of the monument can be read. (*Id.*).[1]

At the top of the monument there are two small representations of tablets which contain Hebrew lettering. (Pet.App. 5a). Surrounding the small tablets is a decorative floral design and between the small tablets is

[1] A photograph of the monument as well as two photographs of the front of the Muncipal Building are attached to the Court of Appeals' decision. *Books v. City of Elkhart*, 235 F.3d 292, Appendix (7th Cir. 2000). These photographs are omitted from the petitioner's appendix to their petition in this Court. Another photograph of the monument is attached to this brief at App. 1. It was originally Exhibit 4 to the deposition of Gary Gilot and is reproduced at A.A. 24 in respondents' additional appendix to their main brief in the Court of Appeals.

an eye within a pyramid. (*Id.*). Immediately below that is an eagle holding an American flag in its talons. (Pet.App. 5a-6a). Below the text of the Ten Commandments there are, on either side of the monument, two small Stars of David. (Pet.App. 6a). Centered below the two Stars of David is a Chi-Rho symbol, which represents Christ, consisting of two Greek letters, chi and rho, superimposed upon each other. (*Id.*). At the very base of the monument is an inscription indicating that the monument was presented to the City of Elkhart by the Fraternal Order of Eagles in May of 1958. (*Id.*).

At the southeast corner of the front of the Municipal Building is a rock with a plaque which indicates that the stone honors Revolutionary War soldiers buried in Elkhart County. (*Id.*). Behind the stone is a brick pillar with a light on top of it. (*Id.*). On the pillar is a plaque which states "BEHOLD FRIEND, YOU ARE NOW ON HALLOWED GROUND FOR HERE BURNS FREEDOMS HOLY LIGHT." (*Id.*). The lettering on the Revolutionary War plaque ranges between ⅜ and ½ inches in height. (Gilot). The text on the pillar is ¾ of an inch in height. (*Id.*).[2]

Above the main entrance to the Municipal Building is a bas relief of an elk's head. (Pet.App. 4a). On one side of the elk's head is the word "DEDICATVM" and on the other is the word "JUSTITIAM." (Gilot). The Ten Commandments monument, the Revolutionary War plaque,

[2] These two monuments are depicted at App. 2 to this brief. It was originally Exhibit 5 to the deposition of Gary Gilot and is reproduced at A.A. 25 in respondents' additional appendix to their main brief in the Court of Appeals.

the brick pillar and the elk's head are the only monuments or plaques located on the outside of the Municipal Building property. (*Id.*)[3]

The Ten Commandments monument was presented to Elkhart by the Eagles in 1958 at a Memorial Day ceremony. (Pet.App. 3a). Three members of the local clergy spoke at the ceremony. (*Id.*). One of the clergy implored Americans to accept the precepts of the Ten Commandments. (*Id.*). Another noted that the Ten Commandments should be engraved in the hearts, minds, and consciences of all. (*Id.*).

In 1998, after being informed that it would be sued unless the Ten Commandments monument was removed, the City of Elkhart passed a resolution in support of the monument. (Pet.App. 6a). The resolution notes that the Ten Commandments monument is a historical and cultural monument, recognizing an early code of conduct that has had significant impact on the development of legal principles in Western Civilization. (*Id.*).

Respondent William Books is a resident of Elkhart, having lived there since the early 1980's. (Pet.App. 7a). In the past he has gone to the Municipal Building to pay a traffic ticket, to attend city council meetings when the issues discussed were ones that interested him, and to attend a deposition in this case. (*Id.*). On each occasion he has been forced to confront the Ten Commandments

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[3] At App. 3 to this brief is a composite photograph depicting the front of the Municipal Building. It was originally Exhibit 3 to the deposition of Gary Gilot and is reproduced at A.A. 26 of the respondents' additional appendix to their main brief in the Court of Appeals.

monument. (*Id.*). Additionally, in the course of his daily activities he sees the monument. (*Id.*). He sees it when he: rides his bicycle near the Municipal Building, goes to the Elkhart Public Library which is located across the street from the Municipal Building, or goes to his landlord's office or to visit his cousin, both of which are near the Municipal Building. (*Id.*).

Mr. Books has religious beliefs, although he does not subscribe to the Judeo-Christian view of an individual God. (Affidavit of William Books). He strongly objects to the public display of the Ten Commandments since he does not believe that the City of Elkhart should prefer one religious belief over another, or that it should prefer any religious belief at all. (*Id.*) He must come into direct and unwelcome contact with the Ten Commandments monument on a frequent, if not daily, basis. (Pet.App. 7a). In order to avoid seeing the Ten Commandments monument he would have to assume the special burden of altering his daily routine so as to avoid this direct and unwelcome contact. (*Id.*). This would include having to use a side entrance to the Municipal Building when he went there which would make him feel like a second-class citizen. (Affidavit of William Books).

Respondent Michael Suetkamp is also a resident of Elkhart. (Pet.App. 7a). He has gone to the Municipal Building to: pay a traffic ticket, attend a City Council meeting, talk to the clerk of the City Council, and to attend a deposition in this case. (*Id.*). On each occasion he came into direct contact with the monument. Additionally he comes into direct contact with the monument during the course of his daily activities. (Pet.App. 7a-8a): The route he takes to return from work passes directly by

the Municipal Building. (Pet.App. 8a). He also sees the monument, on occasion, when entering the Elkhart Public Library. (*Id.*).

Mr. Suetkamp is an atheist and is deeply offended and disturbed by the fact that the City of Elkhart has placed the Ten Commandments on its property. (*Id.*). Like Mr. Books, Mr. Suetkamp must frequently come into direct and unwelcome contact with the monument when he participates as a citizen of Elkhart and must go to the Municipal Building, and when he travels through Elkhart during his day. (Pet.App. 7a-8a).

ARGUMENT

Reasons for Denying the Writ

Plenary review in this case is inappropriate for three reasons. First, the Court of Appeals correctly applied settled Establishment Clause analysis in finding that Elkhart's display of the six foot high Ten Commandments monument in front of its municipal building violated the First Amendment. The petitioner merely seeks to correct what it deems to be a misapplication of principles of law that all sides agree upon. Although the petitioner argues that the Seventh Circuit's decision is contrary to the result mandated by application of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) as refined by the endorsement analysis of *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring) and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), the Court of Appeals' decision is entirely consistent with those decisions. Second, plenary review should not be

granted to resolve what petitioner characterizes as a conflict with either the Tenth Circuit's opinion in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) or the Colorado Supreme Court's decision in *State of Colorado v. Freedom from Religion Foundation*, 898 P.2d 1013 (Colo. 1994), *cert. denied*, 516 U.S. 1111 (1996). The latter case involved a Ten Commandments display in a completely different context than the one presented in the case at bar and the former case has been questioned and undermined by the very court which issued it. The Court of Appeals' decision does not create a current conflict with existing law. Third, the holding of the Court of Appeals that the respondents have standing conforms both to existing cases from this Court and to those from other circuits.

I. The Seventh Circuit's decision in this case correctly recognized and applied this Court's holdings in determining whether the Ten Commandments display has a secular purpose and whether, regardless of purpose, it represents an endorsement of religion

A. The legal principles governing this case are well established and not disputed by petitioner in its fact-based challenge to the decision below and petitioner seeks plenary review merely to challenge the Seventh Circuit's application of this established jurisprudence

The test for determining whether religious displays on government property violate the Establishment Clause is set out in *Lemon*. Under *Lemon's* tripartite analysis a challenged governmental practice is constitutional only if: 1) it has a secular purpose, 2) its principal effect

neither inhibits nor advances religion, and 3) it does not foster excessive entanglement.[4] 403 U.S. at 611-12. Of course, governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In *County of Allegheny*, a majority of the Court adopted the endorsement analysis presented by Justice O'Connor in her concurrence in *Lynch* which modified the "effects" prong of *Lemon* to ask "whether, irrespective of government's actual purpose, the practice under review, in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 592. *See also, Santa Fe Independent School District v. Doe*, 530 U.S. 290, 307 (2000) (focusing on "[t]he actual or perceived endorsement of the message."). In determining whether an endorsement exists a court must focus on the particular context of the matter being challenged since, for example, "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 595-597. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement. . . . " *Lynch*,

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[4] In *Mitchell v. Helms*, 530 U.S. 793, 120 S.Ct. 2530, 2540 (2000) (plurality opinion), the plurality opinion noted that to some extent the third *Lemon* factor, "excessive entanglement," had been absorbed into the "primary effect" prong. This further refining of *Lemon* is not relevant here since at no time have Mr. Books and Mr. Suetkamp claimed that the challenged Ten Commandments monument creates "excessive entanglement."

465 U.S. at 694. Of necessity, therefore, when a determination is being made as to whether a specific government practice, reviewed in its context, violates the Establishment Clause, "the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678.

The Seventh Circuit properly recognized that this was the law governing the Establishment Clause. (Pet.App. 13a-15a). Petitioner objects because, in its estimation, the court applied this settled law incorrectly. Given that the results of the application will necessarily be altered by the unique facts and context of each display, the fact that, in the petitioner's opinion, the Seventh Circuit applied the law incorrectly is not grounds for plenary review.[5]

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[5] A review of recent decisions concerning the display of the Ten Commandments on government property indicates that, regardless of their holdings, courts well understand that they must analyze both the purpose of such displays and whether, based on the specific context, an endorsement of religion is created. *See, e.g., Kimbley v. Lawrence County, Indiana*, 119 F.Supp.2d 856 (S.D.Ind. 2000) [preliminary injunction issued against Ten Commandments monument on the lawn of a county courthouse]; *Indiana Civil Liberties Union v. O'Bannon*, 110 F.Supp.2d 842 (S.D.Ind. 2000), *appeal pending;* [preliminary injunction issued against Ten Commandments monument on the grounds of the Indiana Statehouse]; *Adland v. Russ*, 107 F.Supp.2d 782 (E.D.Ky. 2000), *appeal pending* [permanent injunction issued against placing Ten Commandments monument on the grounds of the Kentucky Statehouse]; *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky*, 96 F.Supp.2d 691 (E.D.Ky. 2000) [preliminary injunction issued against a display of Ten Commandments and other documents in county courthouse]; *Doe v. Harlan County School District*, 96 F.Supp.2d 667 (E.D.Ky. 2000) [preliminary injunction issued against posting of Ten Commandments and

B. Applying this well accepted analysis, the Court of Appeals correctly found that the Ten Commandments monument, in its specific context, lacked a valid secular purpose and represented an endorsement of religious belief

1. The Seventh Circuit properly found that the monument lacked a secular purpose

In *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curium*), in striking down a Kentucky statute which required the posting of the Ten Commandments in classrooms, the Court stated the obvious when it indicated that the Ten Commandments is an "undeniably sacred text in the Jewish and Christian faiths. . . . " Given this, the Court of Appeals properly placed on the City of Elkhart the burden of showing an actual secular purpose for the posting of a six foot high Ten Commandments monument at the entrance to its Municipal Building.[6]

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other documents containing references to God and the Bible in a public school]; *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 96 F.Supp.2d 679 (E.D.Ky. 2000) [preliminary injunction issued against posting Ten Commandments and other documents in county courthouse]; *Suhre v. Haywood County, North Carolina*, 55 F.Supp.2d 384 (W.D.N.C. 1999) [allowing a courtroom display containing, among other things, an abridged version of the Ten Commandments]; *Harvey v. Cobb*, 811 F.Supp. 669 (N.D.Ga. 1993), *aff'd without opinion*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 511 U.S. 1129 (1994) [display of Ten Commandments in a courthouse was not in an educational display and was unconstitutional].

[6] In its petition, the City argues that the Court of Appeals imposed a *per se* presumption that a display of the Ten Commandments is unconstitutional. (Petition at 17). This is simply not true since the Court of Appeals explicitly recognized

The only secular purpose advanced by the City is that the Ten Commandments, standing by itself, is a document with historical and secular significance. This is the donative intent which Elkhart ascribes to the Eagles, and this is the gravamen of the resolution which Elkhart's Common Council passed after learning that litigation was imminent. (Pet.App. 2a, 6a). Yet, this Court in *Stone* specifically held that merely asserting, even in a writing that accompanied the posting of the Decalogue, the secular and historical significance of the Ten Commandments was not enough to overcome its religiosity; this " 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." 449 U.S. at 41. As in *Stone*, the Court of Appeals rejected the notion that merely saying that the Ten Commandments was posted for secular reasons, when the context does not confirm this purpose, is sufficient to dispel the religiosity of the document.[7]

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that there could be situations where the Ten Commandments could be constitutionally displayed by government. (Pet.App. at 16a-17a). Nor is it true, as argued by the petitioner, (Petition at 14), that *Stone* is of limited utility since it concerned the posting of the Ten Commandments in a school setting. The determination in *Stone* that the Ten Commandments is a sacred and holy text was not based on the context of any display, but on the Ten Commandments itself. This is, of course, extremely relevant in assessing both the purpose for the posting of a Ten Commandments monument and its endorsement effect.

[7] Elkhart complains that the Court of Appeals erred in focusing on the statements of the clergy when the monument was donated in 1958. (Petition at 15). The Court of Appeals cites to these statements to illustrate the fact that the code of conduct prescribed by the Ten Commandments is not a secular code, but a religious one. (Pet.App. 18a).

2. The Seventh Circuit properly found that the six foot high Ten Commandments monument on the corner of the Municipal Building's lot, near its main entrance, conveys a message of endorsement of religion

In *County of Allegheny*, 492 U.S. at 597, this Court noted that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends on its context." In reviewing the context of Elkhart's Ten Commandments monument, the Court of Appeals noted that it stands at the seat of governmental power in Elkhart and that "[a]s viewed by the passer-by or by an individual approaching the building, the monument certainly cannot be fairly characterized as a component of a comprehensive display of the cultural heritage of the people of Elkhart." (Pet.App. 22a). Much like the creche on the stairway of the county building was deemed to stand alone in *County of Allegheny*, despite the nearby "presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum . . . ," 492 U.S. at 598, n. 48, there is nothing which detracts from the message of endorsement conveyed by the Ten Commandments monument. Like the creche in *Allegheny*, the Elkhart monument stands alone in a prominent place at the seat of government, physically removed from other displays where its lettering and shape are visible and identifiable to all who pass.

The Court of Appeals also correctly held that even if the monument is viewed with the other objects on the lawn its endorsement effect is not minimized. The City

claims that the Court of Appeals erred in not finding that the other monuments were symbols of patriotism that somehow convert the message of the Ten Commandments from an endorsement of religion into an endorsement of patriotism. (Petition at 18). Yet, the City does not indicate how this conversion takes place. Even if a reasonable person were to view everything located on the front lawn of the Municipal Building as one display he or she would not see a patriotic display which minimizes the religious nature of the Ten Commandments. One monument warns the person they are on "hallowed ground" where a "holy light" burns; this hardly detracts from the Ten Commandments' religiosity, nor does the bas relief with the Latin words "Dedicated to Justice." This merely reemphasizes the fact that the Municipal Building, and all that is on its property, is a place of supreme governmental importance. This does not minimize what a reasonable observer will perceive when he or she observes the Ten Commandments, a sacred and holy text that is deemed to be extremely important by the City of Elkhart.[8] The Court of

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[8] Petitioner argues that, since in *County of Allegheny* this Court upheld the display of a menorah next to a Christmas tree, the Court of Appeals erred by finding that the religious nature of the Ten Commandments was not diminished because it is displayed with the Revolutionary War rock, the brick pillar, and the elk's head. However, *County of Allegheny* does not stand for the proposition that any religious display can be "secularized" if it is displayed near something else. The menorah/Christmas tree display in *County of Allegheny* was a temporary unitary display for the holiday season. There is nothing either temporary or unitary about the display in Elkhart. The Ten Commandments clearly, and permenantly, stands as an entirely separate monument from what else is displayed in front of the Municipal Building. Morever, the objects in the display in

Appeals correctly found that the monument creates an endorsement of religion.

II. Contary to petitioner's assertion there is no significant conflict in the lower courts on the issues presented in this case

A. The proposed circuit conflict

In an attempt to manufacture a circuit conflict, the petitioner cites to only one circuit court case which is arguably in conflict with the Seventh Circuit's decision, *Anderson v. Salt Lake City Corp., supra.* In *Anderson* the 10th Circuit found that a 3 by 5 foot granite Ten Commandments monument donated by the Eagles and erected on the city-county courthouse grounds was not a violation of the Establishment Clause. In so holding, the court concluded that the purpose and the primary effect of the monument were not religious. 475 F.2d at 34. The court held that the Ten Commandments has both secular and religious attributes. 475 F.2d at 33. The court also noted that there was nothing coercive about the display. *Id.*

Anderson preceded *Stone.* In *Stone* this Court specifically noted that, posted by itself, the Ten Commandments is a religious text without secular purpose.

County of Allegheny, a menorah and Christmas tree, were deemed to not be exclusively religious, but to also symbolically represent a holiday which "has both religious and secular dimensions." 492 U.S. at 614. The same is not true for the Ten Commandments. *Stone*, 449 U.S. at 42.

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

449 U.S. at 41-42.

In *Summum v. Callaghan*, 130 F.3d 906, 912, n. 8 (10th Cir. 1997), the Tenth Circuit was asked to overrule *Anderson*, but found it unnecessary to do so since it found that the district court's decision could be reversed on other grounds. However, the court quoted the above passage from *Stone* and noted that "[w]e are not at liberty to overrule or disregard the precedent of an earlier panel absent en banc reconsideration or a superseding contrary decision of the United States Supreme Court. . . . We note, however, that our decision in *Anderson* has been called into question by the Supreme Court in *Stone v. Graham.*" *Id.* (Internal citations omitted).[9] Given that the 1980 decision in *Stone* undercuts the validity of the 1973 decision

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[9] Other courts have agreed that, after *Stone*, the continuing validity of *Anderson* has been called into doubt. *See, e.g., Kimbley v. Lawrence County*, 119 F.Supp.2d at 871, n. 10; *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky*, 96 F.Supp.2d at 700.

in *Anderson* and the court that issued *Anderson* doubts its continued validity, there is not a significant conflict between *Anderson* and the Court of Appeals' decision in this case which justifies the grant of plenary review.[10]

B. The proposed conflict with a decision of a state court of last resort

Petitioner argues that the Seventh Circuit's decision conflicts with one decision of a state court of last resort, *State of Colorado v. Freedom from Religion Foundation, supra.* In *Freedom from Religion Foundation,* the Colorado Supreme Court, by a 4-3 margin, upheld as constitutional a Ten Commandments monument which was a smaller version (2-4 feet by 2½ feet) of the one in this case, and which had also been donated by the Eagles. 898 P.2d at 1016-17, *see* Appendix at 1034. The monument was placed into a park that is part of a three block complex of public property, which includes the park and the grounds of the state capital. 898 P.2d at 1015. Throughout the park were large historical statues and memorials. 898 P.2d at 1015-1016. The court examined the context of the monument and noted that it was placed inconspicuously into a park, "where citizens may be found by choice and are not necessarily present for purposes related to government."

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[10] The *Anderson* decision is also questionable to the extent that it focuses on whether the display was coercive. Although coercive efforts by the Government may lead to an Establishment Clause violation, *see, e.g, Lee v. Weisman,* 505 U.S. 577 (1992), there is no requirement that an Establishment Clause violation be predicated on coercion. *County of Allegheny,* 492 U.S. at 597, n. 47; *School District of Abington Township v. Schempp,* 374 U.S. 203, 223 (1963).

898 P.2d at 1025. Thus, like the Court of Appeals' decision below, the Colorado decision recognizes that context is a critical element in the Establishment Clause analysis. For that reason, it is entirely plausible that the Colorado Supreme Court would have reached a different conclusion if the monument there, like the monument here, had been displayed in front of a governmental building where citizens were forced to come into direct and unwelcome contact with it in the course of their civic activities. Therefore, Judge Ripple was plainly correct when he noted, in his entry concerning the petitioner's motion to recall and stay the mandate, that *Freedom from Religion Foundation* "involves a placement situation significantly different from the one before us in this case." (Pet.App. 57a). The Colorado decision, presenting an entirely different factual circumstance and context than this one, does not justify this Court granting plenary review in this case.

III. The Seventh Circuit's holding that the respondents have standing conforms to the prior decisions of this Court and the decisions from other circuits

In this case the Seventh Circuit found, as did the trial court, that the respondents had standing to complain of the Ten Commandments monument because they were forced to come into frequent direct and unwelcome contact with the monument during the exercise of their civic responsibilities as citizens of Elkhart and during their everyday activities. Their only alternative was to assume special burdens to avoid the monument altogether. Petitioner argues that this holding, which conforms to numerous other circuit cases, is contrary to this Court's

decision in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). The petitioner errs.

In *Valley Forge* the plaintiffs sued to prevent the transfer of government property in Pennsylvania to a religious organization. The plaintiffs were an organization and its employees located in Maryland, Virginia and Washington, D.C. 454 U.S. at 486-87. The plaintiffs had no contact with the property; they learned about the transfer from the media. *Id.* This Court found that the plaintiffs' claim that the Establishment Clause was violated did not, by itself, confer standing since a claim of an Establishment Clause violation "does not provide a special license to roam the country in search of governmental wrongdoing and reveal the discoveries in federal court." 454 U.S. at 487. The plaintiffs who were strangers to, and had no contact with, the property had failed to identify any injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485.

The petitioner argues that *Valley Forge* stands for the proposition that psychological injury alone can never amount to the actual or threatened injury which is part of the "irreducible minimum of standing." 454 U.S. at 472. However, this Court stressed in *Valley Forge* that standing can be predicated on unwelcome non-economic injury if the plaintiffs are "directly affected by the laws and practices against which their complaints are directed." 454 U.S. at 436, n. 22 (quoting *Abington School District v. Schempp*, 374 U.S. 203, 224, n. 9 (1963)). This includes the injury suffered by Mr. Books and Mr. Suetkamp. Indeed, in numerous Establishment Clause cases this Court has

allowed standing when persons have alleged direct and immediate injury caused by being required to confront religious displays or observances in the normal course of their daily activities. Thus, in *Schempp* parents and children had standing to challenge school practices which required the children to be subject to school prayer and Bible readings. The fact that the students and the parents were "directly affected by the law and practices against which their complaints are directed . . . surely suffice[s] to give the parties standing to complain." 374 U.S. at 224, n. 9.

After *Valley Forge* was decided in 1982, this Court, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), allowed parents to mount a challenge to an Alabama statute which forced their children to be confronted with compelled school prayer and meditation. In *Edwards v. Aguillard*, 482 U.S. at 581, parents, teachers and religious leaders were allowed to bring a challenge to Louisiana's Creationism Act which forbid the teaching of evolution in public schools without the teaching of creation science. In *County of Allegheny*, the challenge to the religious displays was brought by seven local residents and the Greater Pittsburgh Chapter of the American Civil Liberties Union. 492 U.S. at 587.[11]

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[11] Petitioner argues that the Court of Appeals decision in this case, *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655, 655-58 (3rd Cir. 1988), *aff'd in part, rev'd in part*, 492 U.S. 573 (1989), is "strongly suggestive" of standing in the case being based on taxpayer standing. (Petition at 22). However, a review of the Court of Appeals case discloses no such suggestion. Indeed, the Court of Appeals decision emphasizes that the challenged creche was privately owned, although it was stored in the basement of the courthouse and "the county

The challenge to the graduation prayer in *Lee v. Weisman*, 505 U.S. at 584, was brought by a parent on his own behalf and on behalf of his child who would be forced to be exposed to graduation prayers if she wished to attend her graduation ceremonies.[12] Parents and their children who were exposed to the challenged school practices were the plaintiffs in the case which struck down school sponsored prayer at football games. *Doe v. Santa Fe Independent School District*, 168 F.3d 806, 808 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).

It is therefore clear that this Court has long recognized that being forced to confront objectionable government owned or sponsored religious displays as a condition of participation in civic functions as well as normal activities is a direct injury giving rise to standing. Petitioner notes that the large majority of the above cases from this Court concern public schools where there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure." (Petition at 21, citing *Lee v. Weisman*, 505 U.S. at 592.) This heightened concern means that certain practices which may offend

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supplie[d] a dolly and minimal aid to transport it to and from the courthouse basement." 842 F.2d at 657. The Court of Appeals also cites the oral opinion of the district court that "[t]he expense to the city [in erecting and storing the menorah] is minimal and of no consequence." 842 F.2d at 658.

[12] The Court specifically noted that inasmuch as Deborah Weisman would be faced with school prayer at her high school graduation "[w]e find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us." 505 U.S. at 584.

the Establishment Clause in the setting of a public secondary school will not in another setting. *Compare Lee v. Weisman*, *supra* (middle school and high school graduation prayer is unconstitutional), *and Tanford v. Brand*, 104 F.3d 982 (7th Cir), *cert. denied*, 522 U.S. 814 (1997) (graduation prayer at college and graduate school graduation is constitutional.) But, it does not alter the fact that regardless of who is perceiving the religious message, if he or she is required to confront the religious message as a condition of taking part in everyday life, the "irreducible constitutional minimum . . . [that] the plaintiff must have suffered an 'injury in fact' – an invasion of a legally-protected interest which is concrete and particularized" – has been met. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.* There is no support in this Court's cases for the proposition that this "essential and unchanging" requirement is in fact a sliding scale which courts are free to modify upward or downward depending on the perceived ages and sensibilities of the plaintiffs.[13]

Therefore, the Seventh Circuit's unanimous conclusion that Mr. Books and Mr. Suetkamp, who "must come in direct and unwelcome contact with the Ten Commandments monument to participate fully as citizens of

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[13] This Court has specifically recognized that the standing requirement cannot be modified based on the legal claim asserted. "[W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States." *Valley Forge*, 454 U.S. at 484.

Elkhart and to fulfill their legal obligations," had standing was correct. (Pet.App. 11a). The Seventh Circuit's decision is consistent with those reached by other circuits as well. *See, e.g., Suhre v. Haywood County,* 131 F.3d 1083, 1085-1090 (4th Cir. 1997) [resident who objected to maintenance of a Ten Commandments display in the main courtroom in the county courthouse had standing even though he had not changed his conduct in response to the display; it was sufficient to show that he came into direct contact with the Ten Commandments][14]; *American Jewish Congress v. City of Beverly Hills,* 90 F.3d 379, 381 (9th Cir. 1996) [standing found for a group claiming that a religious display in a public park interfered with its members' rights to enjoy and use the park]; *Washegesic v. Bloomingdale Public Schools,* 33 F.3d 679 (6th Cir. 1994), *cert. denied,* 514 U.S. 1095 (1995) [former student who was

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[14] As the court noted in *Suhre,* 131 F.3d at 1088:

> Absent Supreme Court direction, we are unwilling to craft a rule of standing for religious display cases that would effectively add "insult" to the existing "injury" requirement. Compelling plaintiffs to avoid public schools or buildings is to impose on them a burden that no citizen should have to shoulder. A public school or county courthouse exists to serve *all* citizens of a community, whatever their faith may be. Rules of standing that require plaintiffs to avoid public places would make religious minorities into outcasts. Forcing an Establishment Clause plaintiff to avoid the display of which he complains in order to gain standing to challenge it only imposes an extra penalty on individuals already alleged to be suffering a violation of their constitutional rights. We do not think Article III requires as much.

forced to confront portrait of Jesus when he visited school had standing to challenge the posting of the portrait]; *Murray v. City of Austin, Texas,* 947 F.2d 147, 151 (5th Cir. 1991), *cert. denied,* 505 U.S. 1219 (1992) [finding that plaintiffs have standing to challenge a city seal containing a Latin cross]; *Smith v. County of Albermarle, Va.,* 895 F.2d 953, 955 (4th Cir.), *cert. denied,* 498 U.S. 823 (1990) [county residents challenging religious display on county office building lawn had standing since they alleged a direct and concrete, albeit non-economic, injury]; *Foremaster v. City of St. George,* 882 F.2d 1485, 1488-90 (10th Cir. 1989), *cert. denied,* 495 U.S. 910 (1990) [citizen's allegation of direct and personal contact with city's logo depicting Mormon temple is sufficient to confer standing even though the plaintiff had not changed behavior but found the display offensive and intimidating]; *Saladin v. City of Milledgeville,* 812 F.2d 687, 691-92 (11th Cir. 1987) [residents in and around city had standing to challenge city seal containing the word "Christianity" because they come into direct contact with the unwelcome religious message].[15]

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[15] In the specific context of the Ten Commandments, the district courts have had no problem perceiving the significant difference between an individual who is forced to confront an objectionable religious display on a frequent basis and one who has, at best, a conjectural contact with it. *Compare, Harvey v. Cobb,* 811 F.Supp. at 674-75 [lawyer had standing to challenge Ten Commandments posting in courthouse since, among other reasons, he had regular contact with the document]; *Shea v. Brister,* 26 F.Supp.2d 943 (S.D.Tex. 1988) [lawyer who had no pending cases in court where Ten Commandments was posted and who had not been required to appear there during pendency of the case did not have standing to challenge

Mr. Books and Mr. Suetkamp come into direct and unwelcome contact with the monument when they go to the Municipal Building for civic functions. They also come into direct and unwelcome contact with the monument during their normal daily activities. To avoid the monument would cause them to assume special burdens and would, in the words of Mr. Books, relegate them to the status of second-class citizens. This will continue in the future if the monument is not removed. This is not injury which is abstract, hypothetical or speculative. It is an injury in fact which is real and immediate. They have suffered particularized injury; injury which affects each respondent "in a personal and individual way." *Lujan*, 504 U.S. at 560, n. 1. The Seventh Circuit's standing decision was therefore correct and consistent with this Court's prior decisions.

CONCLUSION

Certiorari is not warranted. The Seventh Circuit decision's Establishment Clause analysis conforms to the context-based analysis demanded by this Court. Moreover, there is no conflict with prior decisions of a circuit court or state supreme court which justify the granting of plenary review. And, the Seventh Circuit decision's standing

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monument since threat of future contact was too speculative]; *Alabama Freethought Association v. Moore*, 893 F.Supp. 1522 (N.D.Ala. 1995) [citizens who could not definitely show that they would be in courtroom in the future where Ten Commandments was posted did not have standing since threatened injury was too speculative].

holding conforms to prior decisions of this Court. Since there are no grounds for granting the petition it should be denied.

Respectfully submitted,

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App. 1

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